

Luff (Migration) [2019] AATA 5388 (24 July 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Danielle Luff
CASE NUMBER:	1811208
DIBP REFERENCE(S):	bcc2016/3238791
MEMBER:	Joseph Francis
DATE:	24 July 2019
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations

Statement made on 24 July 2019 at 3.10pm

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine and continuing relationship – pooled financial resources – shared household expenses and housework – parties represent themselves to others as in a committed relationship – joint social activities – companionship and emotional support – mutual commitment to shared life to exclusion of others – in de facto relationship for 12 months before visa application – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994 (Cth), rr 1.09A(3), 1.15A(3), 2.03A(3), Schedule 2, cl 820.211,

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act). The applicant applied for the visa on 29 September 2016. The delegate refused to grant the visa on 13 April 2018.
3. The delegate assessed the application under Subclause (2) of clause 820.211. Subclause (2) requires that the applicant and the sponsor are either spouse or de facto partner of the sponsoring spouse as defined in section 5F and 5CB respectively. The delegate was not satisfied there was sufficient evidence to demonstrate the applicant was the spouse or de facto partner of the sponsor as defined under section 5F and 5CB of the Migration Act.
4. The Tribunal notes that it was in receipt of substantially more information that was available to the Delegate. In reaching its decision the Tribunal did not consider a hearing to be necessary as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
5. The review applicant was not represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue at present is whether the visa applicant is the spouse or de facto partner of the sponsor as defined under s.5F and s.5CB of the Act.

9. Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant and sponsor claimed to be in a de facto relationship at the time of visa application, and are now married at the time of this decision.
11. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Whether the parties are in a spouse or de facto relationship at the time the application was made?

12. The issue in the present case is whether the visa applicant is the de facto partner of the review applicant at the time of application.

13. At both the time of application and the delegate's decision, the parties were not married to each other under a marriage that is valid for the purpose of the Act so therefore cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately apart on a permanent basis, and the couple are not related by family: s.5CB(2).

14. Relationship background

15. The visa applicant is a 27 year old Canadian Citizen
16. The review applicant is a 31 Year old Australian Citizen
17. The review applicant provided a copy of the Department's decision record with the application.
18. The parties claim to have met in January 2015 on social networking site Tumblr.com
19. The parties first met in person on 19 May 2015 in Canada. They claim to have entered into a committed relationship two months prior, and agreed to marry on 25 December 2015.
20. The parties were married on 10 March 2017 in Western Australia and have provided a valid marriage certificate.
21. Further documented evidence in support of the application was also provided, including financial records, receipts from shared expenses, and photographs of how their relationship is portrayed to family and friends.
22. The Tribunal finds on the evidence that the parties are not related by family.

23. Are the other requirements for a spouse relationship met?

24. The Tribunal has before it the delegate's decision which was submitted by the review applicant to the Tribunal. The Tribunal has had regard to detailed written submissions made on behalf of the review applicant by his representative and documentary evidence submitted to the Tribunal. The Tribunal also has before it the Department's file relating to the visa applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it. This material includes:
- Income tax return for Financial year 16/17 from visa applicant nominating sponsor as spouse
 - Bank account statements in joint names opened in February 2016
 - Statement from visa applicant which includes screen shot from DIPB website and explanation of why evidence could not be uploaded with visa application due to DIPB website error
 - Residential Tenancy Agreement in both parties names for house lease in Western Australia commencing 30 April 2016
 - Social media photos showing the parties in various locations and with various other people

- Social media Chat records between parties.

25. *Financial Aspects*

26. The Tribunal considered the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of any pooling of financial resources, any legal obligations owed, and any sharing of day-to-day household expenses.
27. The Tribunal finds that the parties have significant shared financial interests, including rental obligations, shared bank accounts, utility service accounts for a shared household, and superannuation.
28. The Tribunal places weight on the evidence provided with regard to pooling of resources through joint bank statements and the sharing of household expenses.
29. The Tribunal has had the benefit of reviewing the relevant financial information including invoices, contracts, and bank statements for both applicants. On the basis of this evidence, the Tribunal finds that the visa applicant and sponsor have a relevant pooling of financial resources; including through sharing of day-to-day living expenses as evidenced by a rental tenancy contract and utility accounts provided.

30. *Nature of the Household*

31. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of the responsibility for the housework. There parties have no children together.
32. The parties have been able to establish a shared household in Western Australia which is evidenced by a Rental Tenancy Agreement in joint names, various receipts for household goods, and social media indicating mutual agreement between the applicants consistent with a genuine and ongoing relationship about matters of interest and housework.
33. The Tribunal places weight on the evidence provided with regards to the established shared household in Western Australia. The Tribunal finds that the nature of the parties' household is such as would indicate a genuine de facto relationship from May 2015.

34. *Social aspects of the relationship*

35. The Tribunal has had regard to the evidence provided as to whether the parties represented themselves to others as being in a de facto relationship from 22 May 2015, the opinion of their friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
36. The parties provided supporting material including a number of supporting statements from family and friends.
37. Mr Kevin Ernest John Luff, the sponsor's father, provided a statement attesting the visa applicant has become a valued member of the family. The Tribunal places weight on the third party statements provided in support of the relationship.
38. A number of photographs submitted to the Tribunal show the parties in various social settings, travelling together, and in the company of friends in various locations. These indicate that the parties present themselves to both their families and friends as being in a genuine and continuing relationship.

39. The Tribunal places weight on the evidence provided with regards to how the parties present themselves to others.
40. The Tribunal considered the evidence provided as to the social aspects of the relationship, including whether the parties represented themselves to other people as being in a genuine relationship, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
41. The Tribunal finds, based on the supporting documentary evidence and in the context of these circumstances, that the parties represent themselves socially in a manner consistent with a genuine and committed de facto relationship.
42. The Tribunal considers the social aspects of the applicant and sponsor's relationship to be indicative of a genuine and continuing relationship at the time of application and has been so since 22 July 2015 when the sponsor travelled to Canada to meet the visa applicant's family.
43. *Nature of the person's commitment to one another*
44. The Departments movement records showed the visa applicant had multiple arrivals and departures between 2015 and 2018 spending considerable time in Australia for the purpose of perusing their joint commitment to an ongoing relationship.
45. The Tribunal finds that the parties have been in regular contact and derive a level of companionship and emotional support from one another and clearly see the relationship as long-term as evidenced by their future plans, regarding children, social and career objectives. In this regard, the Tribunal places significant weight on the evidence contained within the statements provided by both the sponsor, including the fact that they are now married to each other and have lived together since April 2016.
46. The Tribunal finds that the visa applicant and sponsors commitment to each other is significant, with consideration to the length of time they have affirmed they have been in a relationship.
47. The Tribunal considers the nature of the applicant's and sponsor's commitment to each other to be clearly consistent with a genuine and continuing married relationship at the time of application.
48. The Tribunal has considered all of the circumstances of the relationship including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other.
49. Having considered all the circumstances of the relationship the Tribunal is satisfied that at the time of application the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others; the relationship between them is genuine and continuing; they live together and not separately and apart on a permanent basis; and they are not related by family.
50. **Are the additional criteria for a de facto relationship met?**
51. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

52. Further, the applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
53. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. Based on the evidence before it, the Tribunal has found that the parties have been in a de facto relationship since 22 May 2015.
- 54.
55. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
56. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
57. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
58. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made.
59. The Delegate made the decision on the basis that evidence submitted with the visa application of was not sufficient to demonstrate that the visa applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
60. On 19 April 2018 the Tribunal received evidence listed in Paragraph 19 of this decision. In light of the new evidence received, the Tribunal is satisfied that the criterion is met and has concluded that the matter should be remitted for reconsideration.

DECISION

61. The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations

Joseph Francis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).